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October 21, 2008 – *sent via facsimile and U.S. Mail*

Dear Mr. O'Neill:

The undersigned voting rights organizations are writing to express our deep concern about the investigation for which we understand you recently have been appointed as a special prosecutor by court order. See "Deters Steps out of Voter Probe," available at <http://news.cincinnati.com/article/20081020/NEWS0106/310200039/1055/NEWS>; Associated Press, "Deters Subpoenas Voting Records," available at <http://news.cincinnati.com/apps/pbcs.dll/article?AID=/200810190522/NEWS0106/810190381>.

According to these articles, Hamilton County Prosecutor Joseph Deters recently opened an investigation, and issued a subpoena for unredacted personal information, with respect to several hundred voters who registered and cast an absentee ballot on the same day during the period September 30 through October 6. As your review of the law no doubt already has revealed, such voting is fully legal in Ohio as established by repeated rulings by the Ohio Supreme Court, the United States District Courts for the Northern and Southern Districts of Ohio, and the United States Court of Appeals for the Sixth Circuit. Nonetheless, it appears that Mr. Deters issued the aforementioned subpoena while at the same time serving as the Southwest Ohio chairman of the McCain presidential campaign.

Mr. Deters' obvious conflict of interest appears to have been the impetus for your appointment. Subsequent public statements by Mr. Deters, however, make it likely that regardless of whether your appointment resolved that conflict, Mr. Deters' other conduct has irreparably tainted this investigation, and in particular has tainted any further actions in the weeks leading up to November 4 election.

Mr. Deters initially declined to identify any specific basis for an investigation other than general "complaints of fraud," and couldn't discern the source of the allegations. It is our understanding that the Hamilton County Board of Elections has confirmed that no fraud allegations have come from county election officials. The possibility that Mr. Deters launched this investigation without any evidence or credible allegation that such voters have registered or voted illegally is troubling.

Subsequent statements attributed to Mr. Deters make broad claims of illegal conduct. Such claims in the weeks before an election will have a chilling effect on participation by lawful voters. That some of his broad assertions do not support a finding of illegal conduct is disconcerting. According to the latest articles, Mr. Deters apparently conducted some version of a database match and determined that 100 registrants did not match the addresses in other

databases, and another 166 could not be found in whatever database was used. As you are undoubtedly aware, there are many reasons for which such database mismatches – through no fault of the voter – would yield unreliable results and cannot serve as the sole basis for questioning a voter’s eligibility. This fact was recognized by the Secretary of State. *See, e.g.*, Brunner Statement of Today’s (En Banc) Ruling, Oct. 14, 2008, located at <http://www.sos.state.oh.us/SOS/PressReleases/2008%20Press%20Releases/20081014.aspx>. Furthermore, Mr. Deters raised additional questions about the validity of the ballots cast by voters who, rather than showing photographic identification, provided the last four digits of their social security numbers or driver’s license number – as permitted by state law. OHIO REV. CODE § 3509.05(A)<sup>1</sup>

You should bear in mind that such an investigation could threaten the federally protected rights of Hamilton County voters under the Voting Rights Act of 1965 and the United States Constitution. We urge you immediately to cease any further investigation of persons who are not accused of anything other than exercising their lawful right to vote.

Please bear in mind that Section 11(b) of the Voting Rights Act, 42 U.S.C. § 1973i(b), provides:

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e).

If law enforcement officials in Hamilton County have launched an investigation of persons who registered and/or voted in-person absentee ballots during the six-day period from September 30 through October 6, based solely on the fact that these voters availed themselves of this entirely lawful registration and voting opportunity, it is difficult to view such an investigation as anything other than unlawful intimidation under Section 11(b) of the Voting Rights Act. The act of registering and voting in keeping with state law obviously cannot, in and of itself, provide justification for a law enforcement investigation.

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<sup>1</sup> The Ohio Revised Code specifies that the voter provide the last four digits of their Social Security number or their Ohio driver’s license number on the sealed absentee ballot identification envelope. OHIO REV. CODE § 3509.05(A). That section of the code also provides a fall back, if the voter is unwilling or unable to provide either number.

If the elector does not provide the elector’s driver’s license number or the last four digits of the elector’s social security number on the statement of voter on the identification envelope, the elector also shall include in the return envelope with the identification envelope a copy of the elector’s current valid photo identification, a copy of a military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the name and address of the elector.

OHIO REV. CODE § 3509.05(A).

Regardless of which type of identification is used – a number on the identification envelope or a copy of a valid form of ID inside the envelope – an absentee voter is required by law to provide identification just like any other voter who chooses to vote in person on Election Day.

You are no doubt aware, or should be aware, that four different federal and state courts have recently upheld the lawfulness of Ohio's statutory provisions allowing voters to register and cast and in-person absentee ballot during the six-day window between the beginning of early voting and the end of the registration period, and have rejected any interpretation of Ohio law or federal law that would require a 30-day waiting period between registration and casting an absentee ballot.

First, in *State ex rel. Colvin v. Brunner*, the Ohio Supreme Court issued a ruling on September 29, 2008, unequivocally rejecting the contention that persons who register to vote and cast an absentee ballot on the same day during the overlap period between early voting and the close of registration are somehow violating Ohio law.

Second, in *Project Vote v. Madison County Board of Elections*, the United States District Court for the Northern District of Ohio issued a temporary restraining order on September 29, 2008, enjoining the Madison County Board of Elections from imposing a 30-day waiting period between registration and casting an absentee ballot. The ruling noted that imposing such a waiting period not only was entirely unjustified under Ohio law, but also would violate the requirements of Section 202 of the Voting Rights Act of 1970.

Third, in *Ohio Republican Party v. Brunner*, the United States District Court for the Southern District of Ohio, relying on the Ohio Supreme Court's decision upholding the legality of same-day registration during the early voting period from September 30 through October 6, issued a decision on September 29, 2008, rejecting the request of the Ohio Republican Party for a temporary restraining order to prohibit persons who registered between September 30 and October 6 from casting an absentee ballot at the same time.

Fourth, when the Ohio Republican Party filed an emergency appeal to the United States Court of Appeals for the Sixth Circuit in the *Ohio Republican Party v. Brunner* case, the Sixth Circuit issued a ruling on September 30, 2008, affirming that court's denial of a temporary restraining order, again upholding the legality of Ohio's same-day registration window.

These rulings have entirely eliminated any argument that registering and voting during the "overlap" period between September 30 and October 6 is anything other than lawful under Ohio law. Accordingly, the fact that a voter has registered and cast an absentee ballot during this period cannot provide grounds for an investigation by law enforcement officials. Under these circumstances, we believe that such an investigation would constitute intimidation and harassment of persons exercising their lawful right to register and vote in a federal election, in violation of Section 11(b) of the Voting Rights Act. Voters in Hamilton County will now be fearful that exercising the right to vote has exposed them to law enforcement investigation, and this will surely chill their future willingness to participate in elections. The fact that the subpoena issued by Mr. Deters required release of these voters' personal information to the chair of the Southwest Ohio John McCain campaign will, in the public mind, inevitably call into question the fundamental integrity of the investigation you have inherited and further dissuade lawful voters from seeking to exercise their voting rights.

Under a predecessor statute to Section 11(b), the U.S. Court of Appeals for the Fifth Circuit held that local officials in Alabama had engaged in unlawful intimidation under the 1957 Civil Rights Act when they followed persons on their way home from a voter registration meeting and arrested them for actual traffic violations. The pretext of carrying out an investigation of possible traffic violations did not immunize from scrutiny the conduct of local officials that tended to intimidate persons exercising their voting rights. Here, based on the information in the news article cited above, it is not clear that there is even the pretext that your investigation is based on some independent law enforcement justification.

Moreover, even if no one intended to intimidate persons exercising their right to vote, the legislative history of Section 11(b) makes clear that a lack of intent is not a defense in a lawsuit alleging a violation of Section 11(b). While the 1957 Civil Rights Act made it unlawful for any person “to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose,” 42 U.S.C. § 1971(b), the reference to purpose was eliminated when the anti-intimidation provision was added to the Voting Rights Act of 1965 in Section 11(b). The House Report accompanying the Voting Rights Act of 1965 states: “unlike 42 U.S.C. 1971(b) (which requires proof of a ‘purpose’ to interfere with the right to vote) no subjective purpose or intent need be shown.” H. Rep. No. 439, 89th Congress, 1st Sess. 30 (1965). Moreover, “the prohibited acts of intimidation need not be racially motivated” to be actionable under Section 11(b). *Id.* Because your investigation is reasonably likely to intimidate persons in the exercise of their voting rights, it is a likely violation of Section 11(b).

In addition to constituting a likely violation of Section 11(b) of the Voting Rights Act, an unwarranted investigation of lawful voting activities creates concerns about a potential violation of the criminal prohibitions of Section 12 of the National Voter Registration Act of 1993 (“NVRA”), 42 U.S.C. § 1973gg-10, which provides for criminal penalties against:

- A person, including an election official, who in any election for Federal office -
  - (1) knowingly and willfully intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, any person for -
    - (A) registering to vote, or voting, or attempting to register or vote;
    - (B) urging or aiding any person to register to vote, to vote, or to attempt to register or vote[.]

We would also note that 18 U.S.C. §§ 241 and 242 provide criminal sanctions against persons who intimidate persons in the exercise of their constitutional right to vote or deprive persons of such rights.

Moreover, we believe that an investigation of persons based on nothing more than their exercise of their right to register and vote also would violate their constitutional rights under the First and Fourteenth Amendments to the U.S. Constitution.

For all these reasons, we urge you to suspend any investigation not based on specific, credible evidence of illegal conduct by specific voters in Hamilton County. Because of our concern about the potential violations of law referenced in this letter, we are providing a copy of

this letter to the Voting Section and the Criminal Section of the Civil Rights Division of the U.S. Department of Justice, the Ohio Attorney General, and the Ohio Secretary of State.

Very truly yours,

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